



1995 ASSEMBLY BILL 721

December 6, 1995 - Introduced by Representatives HUBER, KLUSMAN, MURAT, GREEN, GOETSCH, GROBSCHMIDT, LADWIG, DUFF, SPRINGER, DOBYNS, FREESE, HANSON, WALKER, SCHNEIDERS, PLACHE, F. LASEE, BRANDEMUEHL, AINSWORTH, OLSEN, GUNDERSON, OTTE, LEHMAN, NASS, LAZICH and POWERS, cosponsored by Senators BURKE, DARLING, BUETTNER and DECKER. Referred to Committee on Judiciary.

1 **AN ACT to repeal** 971.23 (2) (title), 971.23 (4), 971.23 (9) (title), 971.24 (title) and
2 (1) and 971.25 (title); **to renumber and amend** 971.23 (1), 971.23 (2), 971.23
3 (3) (a), 971.23 (9), 971.24 (2), 971.24 (3), 971.25 (1) and 971.25 (2); **to amend**
4 48.293 (2), 165.79 (1), 908.08 (6), 967.08 (3) (c), 971.23 (5), 971.23 (6), 971.23 (7),
5 971.23 (8) (a), 971.23 (8) (d), 971.31 (5) (b) and 972.10 (5); **to repeal and**
6 **recreate** 971.23 (1) (title) and 971.23 (3) (title); and **to create** 304.06 (3d),
7 971.23 (1) (g) and (h), 971.23 (2m), 971.23 (3) (am), 971.23 (6m) (title), 971.23
8 (8) (e) and 973.10 (2g) of the statutes; **relating to:** discovery in criminal cases.

Analysis by the Legislative Reference Bureau

This bill makes various changes in current law governing discovery in criminal cases. The provisions of current law and the changes made by this bill are as follows:

Current law

1. Under current law, a prosecutor in a criminal case must, at the request of the defendant in the case, disclose to the defendant certain information concerning the case, or allow the defendant to inspect and copy or photograph certain information and items relating to the case, if the information or item is in the possession, custody or control of the state. Specifically, under current law the prosecutor must disclose or provide access to the following information or items:

a) Any written or recorded statement concerning the alleged crime made by the defendant.

b) A written summary of all oral statements of the defendant which the prosecutor plans to use during the trial.

c) The names of witnesses to the written and oral statements which the prosecutor plans to use during the trial.

d) A copy of the defendant's criminal record and the criminal record of a prosecution witness that is known to the prosecutor.

e) Evidence obtained from a one-party consent recording that the prosecutor intends to use at trial.

Also, under case law interpreting constitutional provisions relating to criminal cases, a prosecutor must also disclose evidence in his or her possession that is favorable to the defendant.

2. Under current law, both the prosecutor and the defendant or defense attorney must make reciprocal disclosures of information or allow reciprocal access to certain information or items as follows:

a) Before a witness other than the defendant testifies at trial, a party must provide to the other party any written or phonographically recorded statements of the witness.

b) On the motion of a party, all parties must produce, at a reasonable time and place designated by the court, all physical evidence which each party intends to introduce in evidence at the trial.

c) On the motion of a party, a court may order that any item of physical evidence a party intends to introduce at the trial be produced for scientific analysis. The court may also order the production of reports or results of any scientific tests or experiments made by any party relating to evidence intended to be introduced at the trial.

3. Under current law, if a defendant offers to provide the prosecutor with a list of witnesses whom he or she intends to call at trial, the prosecutor must provide to the defendant a list of witnesses whom the prosecutor intends to call at trial. After receiving the prosecutor's witness list, the defendant must provide his or her witness list to the prosecutor.

4. Under current law, if a defendant intends to rely on an alibi as a defense, he or she must provide the prosecutor with a notice of alibi at least 15 days before trial. The notice of alibi must specify where the defendant claims to have been at the time the crime was committed and list the witnesses, if known, to the defendant's alibi. Within 10 days of receiving a notice of alibi, the prosecutor must provide the defendant with a list of witnesses whom the prosecutor intends to offer in rebuttal to discredit the defendant's alibi.

5. Under current law, a defense attorney must, at the request of the prosecutor, disclose to the prosecutor the criminal record of a defense witness, other than the defendant, that is known to the defense attorney.

6. Finally, under current law, if, after complying with a requirement concerning disclosure and discovery, a party discovers additional material or the names of additional witnesses that are subject to discovery, inspection or production, the party must promptly notify the other party of the existence of the additional material or names.

Changes made by this bill

This bill expands the discovery and disclosure requirements that apply to both the prosecutor and the defendant by doing all of the following:

1. The bill eliminates the procedure under current law concerning the exchange of witness lists (described in item 3, above) and instead requires both the prosecutor and the defendant or defense attorney to provide, at the request of the other party, a list of witnesses whom he or she intends to call at trial, with the exception that the defendant is not required to list himself or herself on the witness list provided to the prosecutor.

2. The bill changes current law concerning notice of alibi (described in item 4, above) by requiring the defendant to provide a notice of alibi at least 30 days before trial and by requiring the prosecutor to provide a list of alibi rebuttal witnesses within 15 days of receiving the defendant's alibi notice. The bill also provides that any witness who will testify about the alibi must be disclosed as part of the notice of alibi procedure even if that witness must also be disclosed on the witness lists that the parties must exchange under the bill.

3. The bill eliminates the provisions of current law that require a motion by a party to produce physical evidence for inspection. Instead, the bill requires the following: a) the prosecutor must, at the request of the defendant or defense counsel, disclose and make available for inspection all relevant physical evidence seized or obtained as a part of the investigation of the offense charged; and b) the defendant or defense counsel must, at the request of the prosecutor, disclose and make available for inspection any physical evidence that the defendant intends to offer in evidence at the trial. The bill does not change current law provisions concerning the production of physical evidence for scientific testing.

4. The bill eliminates the provision of current law that requires a court to order production of reports or results of any scientific test or experiments relating to evidence intended to be introduced at trial. Instead, the bill requires both a prosecutor and a defendant or defense counsel to disclose, at the request of the other party, and make available for inspection any relevant written or recorded statements of a witness who is on a witness list required under the bill, including any reports or statements of an expert witness made concerning the case and the results of any physical or mental examination, scientific test, experiment or comparison that the party calling the witness intends to offer in evidence at trial.

5. The bill codifies the requirement established in case law that a prosecutor must disclose and allow inspection and copying of any evidence that is favorable to the defendant.

6. The bill permits a judge to advise a jury that a prosecutor or defendant or defense attorney failed or refused to disclose, or disclosed in an untimely manner, any information required to be disclosed under the bill.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 48.293 (2) of the statutes is amended to read:

1 48.293 (2) All records relating to a child which are relevant to the subject
2 matter of a proceeding under this chapter shall be open to inspection by a guardian
3 ad litem or counsel for any party, upon demand and upon presentation of releases
4 where necessary, at least 48 hours before the proceeding. Persons entitled to inspect
5 the records may obtain copies of the records with the permission of the custodian of
6 the records or with permission of the court. The court may instruct counsel not to
7 disclose specified items in the materials to the child or the parent if the court
8 reasonably believes that the disclosure would be harmful to the interests of the child.
9 Sections 971.23 to 971.25 and 972.11 (5) shall be applicable in all delinquency
10 proceedings under this chapter except the court shall establish the timetable for the
11 disclosures required under ss. 971.23 (3), (1), (2m) and (8) and (9) and 972.11 (5).

12 **SECTION 2.** 165.79 (1) of the statutes is amended to read:

13 165.79 (1) Evidence, information and analyses of evidence obtained from law
14 enforcement officers by the laboratories is privileged and not available to persons
15 other than law enforcement officers nor is the defendant entitled to an inspection of
16 information and evidence submitted to the laboratories by the state or of a
17 laboratory's findings, or to examine laboratory personnel as witnesses concerning
18 the same, prior to trial, except to the extent that the same is used by the state at a
19 preliminary hearing and except as provided in s. 971.23. Upon request of a defendant
20 in a felony action, approved by the presiding judge, the laboratories shall conduct
21 analyses of evidence on behalf of the defendant. No prosecuting officer is entitled to
22 an inspection of information and evidence submitted to the laboratories by the
23 defendant, or of a laboratory's findings, or to examine laboratory personnel as
24 witnesses concerning the same, prior to trial, except to the extent that the same is
25 used by the accused at a preliminary hearing and except as provided in s. 971.23.

1 Employes who made examinations or analyses of evidence shall attend the criminal
2 trial as witnesses, without subpoena, upon reasonable written notice from either
3 party requesting the attendance. ~~Nothing in this section limits the right of a court~~
4 ~~to order the production of evidence or reports under s. 971.23 prior to trial.~~

5 **SECTION 3.** 304.06 (3d) of the statutes is created to read:

6 304.06 **(3d)** Upon demand prior to a revocation hearing under sub. (3), the
7 district attorney shall disclose to a defendant the existence of any videotaped oral
8 statement of a child under s. 908.08 which is within the possession, custody or control
9 of the state and shall make reasonable arrangements for the defendant and defense
10 counsel to view the videotaped statement. If, subsequent to compliance with this
11 subsection, the state obtains possession, custody or control of such a videotaped
12 statement, the district attorney shall promptly notify the defendant of that fact and
13 make reasonable arrangements for the defendant and defense counsel to view the
14 videotaped statement.

15 **SECTION 4.** 908.08 (6) of the statutes is amended to read:

16 908.08 **(6)** Videotaped oral statements of children under this section in the
17 possession, custody or control of the state are discoverable under ss. 48.293 (3) and
18 971.24 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

19 **SECTION 5.** 967.08 (3) (c) of the statutes is amended to read:

20 967.08 **(3)** (c) Motions for ~~inspection or~~ testing of physical evidence under s.
21 971.23 (4) ~~or~~ (5) or for protective orders under s. 971.23 (6).

22 **SECTION 6.** 971.23 (1) (title) of the statutes is repealed and recreated to read:

23 971.23 **(1)** (title) WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT.

24 **SECTION 7.** 971.23 (1) of the statutes is renumbered 971.23 (1) (intro.) and
25 amended to read:

1 971.23 (1) (intro.) Upon demand, the district attorney shall disclose to the
2 defendant or his or her attorney and shall permit the defendant ~~within a reasonable~~
3 ~~time before trial~~ or his or her attorney to inspect and copy or photograph any all of
4 the following materials and information, if it is within the possession, custody or
5 control of the state:

6 (a) Any written or recorded statement concerning the alleged crime made by
7 the defendant ~~which is within the possession, custody or control of the state,~~
8 including the testimony of the defendant in ~~an s. 968.26~~ a secret proceeding under
9 s. 968.26 or before a grand jury. ~~Upon demand, the district attorney shall furnish the~~
10 ~~defendant with a,~~ and the names of witnesses to the defendant's written statements.

11 (b) A written summary of all oral statements of the defendant which the district
12 attorney plans to use in the course of the trial. ~~The~~ and the names of witnesses to
13 the ~~written and~~ defendant's oral statements ~~which the state plans to use in the course~~
14 ~~of the trial shall also be furnished.~~

15 **SECTION 8.** 971.23 (1) (g) and (h) of the statutes are created to read:

16 971.23 (1) (g) All relevant physical evidence seized or obtained as a part of the
17 investigation of the offenses charged.

18 (h) Any exculpatory evidence.

19 **SECTION 9.** 971.23 (2) (title) of the statutes is repealed.

20 **SECTION 10.** 971.23 (2) of the statutes is renumbered 971.23 (1) (c) and
21 amended to read:

22 971.23 (1) (c) ~~Upon demand prior to trial, the district attorney shall furnish the~~
23 ~~defendant a~~ A copy of the defendant's criminal record ~~which is within the possession,~~
24 ~~custody or control of the state.~~

25 **SECTION 11.** 971.23 (2m) of the statutes is created to read:

1 **971.23 (2m)** WHAT A DEFENDANT MUST DISCLOSE TO THE DISTRICT ATTORNEY. Upon
2 demand, the defendant or his or her attorney shall disclose to the district attorney
3 and shall permit the district attorney to inspect and copy or photograph all of the
4 following materials and information, if it is within the possession, custody or control
5 of the defendant:

6 (a) A list of all witnesses, other than the defendant, whom the defendant
7 intends to call at trial, together with their addresses and any relevant written or
8 recorded statements of those persons, or reports of the statements of those persons,
9 including any reports or statements of experts made in connection with the case and
10 including the results of any physical or mental examination, scientific test,
11 experiment or comparison that the defendant intends to offer in evidence at trial.
12 This paragraph does not apply to rebuttal witnesses or those called for impeachment
13 only or to reports subject to disclosure under s. 972.11 (5).

14 (c) Any physical evidence that the defendant intends to offer in evidence at the
15 trial.

16 **SECTION 12.** 971.23 (3) (title) of the statutes is repealed and recreated to read:

17 **971.23 (3)** (title) COMMENT OR INSTRUCTION ON FAILURE TO DISCLOSE INFORMATION
18 OR CALL WITNESS.

19 **SECTION 13.** 971.23 (3) (a) of the statutes is renumbered 971.23 (1) (d) and
20 amended to read:

21 **971.23 (1) (d)** A defendant may, not less than 15 days nor more than 30 days
22 before trial, serve upon the district attorney an offer in writing to furnish the state
23 a list of all witnesses the defendant intends to call at the trial, whereupon within 5
24 days after the receipt of such offer, the district attorney shall furnish the defendant
25 a list of all witnesses and their addresses whom the district attorney intends to call

1 at the trial. ~~Within 5 days after the district attorney furnishes such list, the~~
2 ~~defendant shall furnish the district attorney a list of all witnesses and their~~
3 ~~addresses whom the defendant intends to call at the trial. This section shall~~
4 paragraph does not apply to rebuttal witnesses or those called for impeachment only.

5 **SECTION 14.** 971.23 (3) (am) of the statutes is created to read:

6 971.23 (3) (am) A court may advise the jury of any failure or refusal to disclose
7 material or information required to be disclosed under sub. (1) or (2m), or of any
8 untimely disclosure of material or information required to be disclosed under sub.
9 (1) or (2m).

10 **SECTION 15.** 971.23 (4) of the statutes is repealed.

11 **SECTION 16.** 971.23 (5) of the statutes is amended to read:

12 971.23 (5) SCIENTIFIC TESTING. On motion of a party subject to s. 971.31 (5), the
13 court may order the production of any item of physical evidence which is intended
14 to be introduced at the trial for scientific analysis under such terms and conditions
15 as the court prescribes. ~~Except as provided in s. 972.11 (5), the court may also order~~
16 ~~the production of reports or results of any scientific tests or experiments made by any~~
17 ~~party relating to evidence intended to be introduced at the trial.~~

18 **SECTION 17.** 971.23 (6) of the statutes is amended to read:

19 971.23 (6) PROTECTIVE ORDER. Upon motion of a party, the court may at any time
20 order that discovery, inspection or the listing of witnesses required under this section
21 be denied, restricted or deferred, or make other appropriate orders. If the district
22 attorney or defense counsel certifies that to list a witness may subject the witness
23 or others to physical or economic harm or coercion, the court may order that the
24 deposition of the witness be taken pursuant to s. 967.04 (2) to (6). The name of the
25 witness need not be divulged prior to the taking of such deposition. If the witness

1 becomes unavailable or changes his or her testimony, the deposition shall be
2 admissible at trial as substantive evidence.

3 **SECTION 18.** 971.23 (6m) (title) of the statutes is created to read:

4 971.23 **(6m)** (title) IN CAMERA PROCEEDINGS.

5 **SECTION 19.** 971.23 (7) of the statutes is amended to read:

6 971.23 **(7)** CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to
7 compliance with a requirement of this section, and prior to or during trial, a party
8 discovers additional material or the names of additional witnesses requested which
9 are subject to discovery, inspection or production ~~hereunder~~ under this section, the
10 party shall promptly notify the other party of the existence of the additional material
11 or names. The court shall exclude any witness not listed or evidence not presented
12 for inspection or copying required by this section, unless good cause is shown for
13 failure to comply. The court may in appropriate cases grant the opposing party a
14 recess or a continuance.

15 **SECTION 20.** 971.23 (8) (a) of the statutes is amended to read:

16 971.23 **(8)** (a) If the defendant intends to rely upon an alibi as a defense, the
17 defendant shall give notice to the district attorney at the arraignment or at least ~~15~~
18 30 days before trial stating particularly the place where the defendant claims to have
19 been when the crime is alleged to have been committed together with the names and
20 addresses of witnesses to the alibi, if known. If at the close of the state's case the
21 defendant withdraws the alibi or if at the close of the defendant's case the defendant
22 does not call some or any of the alibi witnesses, the state shall not comment on the
23 defendant's withdrawal or on the failure to call some or any of the alibi witnesses.
24 The state shall not call any alibi witnesses not called by the defendant for the purpose
25 of impeaching the defendant's credibility with regard to the alibi notice. Nothing in

1 this section may prohibit the state from calling said alibi witnesses for any other
2 purpose.

3 **SECTION 21.** 971.23 (8) (d) of the statutes is amended to read:

4 971.23 (8) (d) Within ~~10~~ 15 days after receipt of the notice of alibi, or such other
5 time as the court orders, the district attorney shall furnish the defendant notice in
6 writing of the names and addresses, if known, of any witnesses whom the state
7 proposes to offer in rebuttal to discredit the defendant's alibi. In default of such
8 notice, no rebuttal evidence on the alibi issue shall be received unless the court, for
9 cause, orders otherwise.

10 **SECTION 22.** 971.23 (8) (e) of the statutes is created to read:

11 971.23 (8) (e) A witness list required under par. (a) or (d) shall be provided in
12 addition to a witness list required under sub. (1) (d) or (2m) (a), and a witness
13 disclosed on a list under sub. (1) (d) or (2m) (a) shall be included on a list under par.
14 (a) or (d) if the witness is required to be disclosed under par. (a) or (d).

15 **SECTION 23.** 971.23 (9) (title) of the statutes is repealed.

16 **SECTION 24.** 971.23 (9) of the statutes is renumbered 971.23 (1) (bm) and
17 amended to read:

18 971.23 (1) (bm) ~~Notwithstanding sub. (1), if the district attorney intends to use~~
19 ~~evidence~~ Evidence obtained in the manner described under s. 968.31 (2) (b), if the
20 district attorney ~~shall notify the defendant of that intention not less than 30 days~~
21 ~~before trial. The district attorney shall permit the defendant to inspect, listen to or~~
22 ~~copy the evidence upon demand~~ intends to use the evidence at trial.

23 **SECTION 25.** 971.24 (title) and (1) of the statutes are repealed.

24 **SECTION 26.** 971.24 (2) of the statutes is renumbered 971.23 (6m) and amended
25 to read:

1 971.23 **(6m)** Either party may move for an in camera inspection by the court
2 of the documents referred to in sub. (1) any document required to be disclosed under
3 sub. (1) or (2m) for the purpose of masking or deleting any material which is not
4 relevant to the case being tried. The court shall mask or delete any irrelevant
5 material.

6 **SECTION 27.** 971.24 (3) of the statutes is renumbered 971.23 (1) (e) and
7 amended to read:

8 971.23 **(1)** (e) ~~Upon demand prior to trial or revocation hearing under s. 304.06~~
9 ~~(3) or 973.10 (2), the district attorney shall disclose to a defendant the existence of~~
10 Any relevant written or recorded statements of a witness named on a list under par.
11 (d) or reports of the statements of those witnesses, including any reports or
12 statements of experts made in connection with the case, the results of any physical
13 or mental examination, scientific test, experiment or comparison that the district
14 attorney intends to offer in evidence at the trial and any videotaped oral statement
15 of a child under s. 908.08 which is within the possession, custody or control of the
16 state and shall make reasonable arrangements for the defendant and defense
17 counsel to view the videotaped statement. If, subsequent to compliance with this
18 subsection, the state obtains possession, custody or control of such a videotaped
19 statement, the district attorney shall promptly notify the defendant of that fact and
20 make reasonable arrangements for the defendant and defense counsel to view the
21 videotaped statement. This paragraph does not apply to reports subject to disclosure
22 under s. 972.11 (5).

23 **SECTION 28.** 971.25 (title) of the statutes is repealed.

24 **SECTION 29.** 971.25 (1) of the statutes is renumbered 971.23 (1) (f) and amended
25 to read:

1 971.23 (1) (f) ~~The district attorney shall disclose to the defendant, upon~~
2 demand, the criminal record of a prosecution witness which is known to the district
3 attorney.

4 **SECTION 30.** 971.25 (2) of the statutes is renumbered 971.23 (2m) (b) and
5 amended to read:

6 971.23 (2m) (b) ~~The defense attorney shall disclose to the district attorney, upon~~
7 demand, the criminal record of a defense witness, other than the defendant, which
8 is known to the defense attorney.

9 **SECTION 31.** 971.31 (5) (b) of the statutes is amended to read:

10 971.31 (5) (b) In felony actions, motions to suppress evidence or motions under
11 ss. s. 971.23 to 971.25 or objections to the admissibility of statements of a defendant
12 shall not be made at a preliminary examination and not until an information has
13 been filed.

14 **SECTION 32.** 972.10 (5) of the statutes is amended to read:

15 972.10 (5) When the evidence is concluded and the testimony closed, if either
16 party desires special instructions to be given to the jury, the instructions shall be
17 reduced to writing, signed by the party or his or her attorney and filed with the clerk,
18 unless the court otherwise directs. Counsel for the parties, or the defendant if he or
19 she is without counsel, shall be allowed reasonable opportunity to examine the
20 instructions requested and to present and argue to the court objections to the
21 adoption or rejection of any instructions requested by counsel. The court shall advise
22 the parties of the instructions to be given. No instruction regarding the failure to call
23 a witness at the trial shall be made or given if the sole basis for such instruction is
24 the fact the name of the witness appears upon a list furnished pursuant to s. 971.23.
25 Counsel, or the defendant if he or she is not represented by counsel, shall specify and

1 state the particular ground on which the instruction is objected to, and it shall not
2 be sufficient to object generally that the instruction does not state the law, or is
3 against the law, but the objection shall specify with particularity how the instruction
4 is insufficient or does not state the law or to what particular language there is an
5 objection. All objections shall be on the record. The court shall provide the jury with
6 one complete set of written instructions providing the burden of proof and the
7 substantive law to be applied to the case to be decided.

8 **SECTION 33.** 973.10 (2g) of the statutes is created to read:

9 973.10 **(2g)** Upon demand prior to a revocation hearing under sub. (2), the
10 district attorney shall disclose to a defendant the existence of any videotaped oral
11 statement of a child under s. 908.08 which is within the possession, custody or control
12 of the state and shall make reasonable arrangements for the defendant and defense
13 counsel to view the videotaped statement. If, subsequent to compliance with this
14 subsection, the state obtains possession, custody or control of such a videotaped
15 statement, the district attorney shall promptly notify the defendant of that fact and
16 make reasonable arrangements for the defendant and defense counsel to view the
17 videotaped statement.

18 **SECTION 34. Initial applicability.**

19 (1) This act first applies to criminal actions commenced on the effective date of
20 this subsection.

21 **SECTION 35. Effective date.**

22 (1) This act takes effect on July 1, 1996.

23 **(END)**